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Supreme Court, U.S.
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No. 87-1654

In The

Supreme Court of the United States

October Term, 1987

JAMES T. CARKULIS,

Appellant,

v.

STATE OF MONTANA AND DISTRICT COURT OF THE THIRTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

MOTION TO DISMISS OR AFFIRM

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Pursuant to Rule 16.1 of the Rules of this Court, the appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the decision of the Supreme Court of Montana on the grounds that the decision was not a final judgment within the meaning of 28 U.S.C. § 1257 and that the appeal does not present a substantial federal question.

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STATEMENT OF THE CASE

I. STATE STATUTES INVOLVED

This appeal presents the question of the validity of Montana's statutes providing for reciprocal pretrial discovery in criminal cases.

In 1985, the Montana Legislature enacted Mont. Code Ann. §§ 46-15-321 to -329. App. 93a-108a. These statutes set forth the requirements for disclosure by the prosecution (§ 46-15-322) and disclosure by the accused (§ 46-15-323). The statutes also exempt certain materials from the disclosure requirements (§ 46-15-324) and provide for excision and protective orders (§ 46-15-328). The parties have a continuing duty to disclose (§ 46-15-327) and are prohibited from commenting at trial upon any failure to call a witness or raise a defense (§ 46-15-325). The trial court may impose certain sanctions for failure to comply with the discovery provisions (§ 46-15-329).

At issue in this case are the provisions of Mont. Code Ann. § 46-15-323, which require a criminal defendant to make available to the prosecutor the names and addresses of all persons, other than the accused, whom he will call as

witnesses at trial, together with any statements made by them in connection with the case, and a list of all papers, documents, photographs, and other tangible objects that the defendant will use at trial.

II. FACTUAL BACKGROUND

Appellant James T. Carkulis is charged with felony forgery in state district court. Pursuant to Mont. Code Ann. § 46-15-323, the district court has ordered appellant to make available to the State, subject to constitutional or statutory limitations, the names and addresses of all persons, other than appellant, whom he in good faith knows he will call as witnesses at trial and copies of all statements made by them related to the case; the names and addresses of any expert witnesses whom he in good faith knows he will call at trial, together with summaries of their expected testimony; and all papers, documents, photographs, and other tangible objects which appellant in good faith knows will be used as exhibits at trial. App. 58a-60a.

Appellant sought relief from the discovery order by filing a petition for writ of supervisory control or writ of certiorari in the Montana Supreme Court. Mont. Const., Art. 7, § 2(1, 2); Mont. R. App. P., Rule 17(a); Mont. Code Ann. § 27-25-102(2). On December 11, 1986, the Montana Supreme Court denied the petition upon the grounds that the district court had not yet imposed sanctions and that appellant had an adequate remedy by appeal. App. 63a.

Appellant then moved the state district court to reconsider its order. The court denied the motion to reconsider and ordered appellant to disclose the materials set out in

its previous order by May 1, 1987, or be precluded from offering the materials at trial. In its memorandum the district court noted that it is possible that appellant will not know what evidence will be presented very long before trial; as soon as appellant and his counsel do know what witnesses will be called, the court stated, their names, addresses, and statements must be disclosed to the prosecutor. App. 76a-77a.

III. THE DECISION OF THE MONTANA SUPREME COURT

Appellant brought a second petition for writ of supervisory control to the Montana Supreme Court on May 4, 1987. The Montana Supreme Court accepted jurisdiction to determine if supervisory control was proper and denied the petition, holding that the statutory reciprocal pretrial discovery provisions do not violate the state and federal constitutions. *State ex rel. Carkulis v. District Court,* 746 P.2d 605 (Mont. 1987).

In rejecting appellant's argument that the disclosure provisions of Mont. Code Ann. § 45-15-323 violate his state and federal rights against self-incrimination, the Montana Supreme Court relied upon this Court's decision in *Williams v. Florida,* 399 U.S. 78 (1970), as well as upon the reciprocity provided in the state statutes. The state supreme court reasoned that disclosure of prospective witness names and statements was not self-incriminating as to appellant and that the names and statements would be revealed in due course in any event. Applying the "accelerated discovery" rationale of *Williams,* the court held that the State was entitled to the materials in order to avoid surprise, aid the administration of the trial court, and pro-

vide an orderly resolution of the charge. The court also noted the protections for appellant in other provisions of the discovery statutes.

With respect to appellant's claim that disclosure of prospective trial exhibits violated his rights under the Fourth Amendment, the Montana Supreme Court held that the district court's order meets the test of reasonableness under both state and federal constitutions. The court noted that the use of a warrant is not involved in this pretrial discovery procedure and that the discovery order extended only to materials which must eventually come to light at trial.

The Montana Supreme Court also considered and rejected appellant's claim that the imposition of sanctions for failure to abide by the discovery order deprived him of due process. The court relied upon this Court's decisions in *Williams* and *Wardius v. Oregon*, 412 U.S. 470 (1973), in finding that the reciprocal rights of discovery under Montana's statutes provide appellant with due process.

In addition, the Montana Supreme Court found that appellant could obtain a protective order under Mont. Code Ann. § 46-15-328 in the event that observance of the discovery order would result in disclosure of documents which would in themselves incriminate him. The court construed the statute to permit *ex parte* applications for protective orders.

The Montana Supreme Court did not pass upon the appropriateness of the district court's sanctions for the reason that the sanctions have yet to be applied.

Appellant appeals from the decision of the Montana Supreme Court denying his second petition for writ of supervisory control.

ARGUMENT

I. THE DECISION OF THE MONTANA SUPREME COURT IS NOT A FINAL JUDGMENT.

Because the decision of the Montana Supreme Court in this case was not a final judgment within the meaning of 28 U.S.C. § 1257, this Court should dismiss the appeal for want of jurisdiction.

Appellant has not been tried, convicted, or sentenced. The state district court has not applied the preclusion sanction against appellant with respect to any proffered evidence and has left the door open for appellant to make the required pretrial disclosures whenever he determines that evidence subject to the discovery order will be presented at trial. The Montana Supreme Court has reserved the issue of the appropriateness of any sanction actually applied by the district court.

This Court's jurisdiction to review a state court decision is generally limited, under 28 U.S.C. § 1257, to a final judgment rendered by the highest court of the state in which decision may be had. *Flynt v. Ohio,* 451 U.S. 619 (1981); *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975). In *Flynt* this Court noted that the final judgment rule precludes reviewability "where anything further remains to be determined by a State court, no matter how

dissociated from the only federal issue that has been finally adjudicated by the highest court of the State." *Radio Station WOW, Inc. v. Johnson,* 326 U.S. 120 (1945).

The final judgment in a criminal proceeding is the sentence. *Berman v. United States,* 302 U.S. 211 (1937); *Parr v. United States,* 351 U.S. 513 (1956). The decision of the Montana Supreme Court denying appellant's pretrial request for supervisory control over the lower court proceedings is therefore not final and should not be reviewed by this Court.

In certain cases the Court has treated state court judgments as final for jurisdictional purposes even though further proceedings were required in the state court. In *Cox Broadcasting Corp. v. Cohn, supra,* the Court described four exceptions to the rule of finality which may apply in criminal cases. None of these exceptions applies to the present case.

Here the federal issues are not conclusive, and the outcome of the further proceedings is not preordained. The federal issue will not necessarily survive and require decision regardless of the outcome of future state court proceedings. Review of the federal issues is not precluded in subsequent proceedings in this case. Finally, refusal to review the state court decision would not seriously erode federal policy.

The decision to grant supervisory control in original proceedings before the Montana Supreme Court has been viewed by this Court as a final judgment where the sole issue concerned the jurisdiction of a lower state court. *Fisher v. District Court,* 424 U.S. 382 (1976). However, the Court's decision in *Fisher,* a state court adoption proceed-

ing which was opposed by an Indian party's claim of exclusive tribal court jurisdiction, does not require review in this case, either by appeal or by certiorari, as an exception to the final judgment rule. As in *Flynt, supra,* it appears in appellant's case that other federal issues will be involved in the trial court, such as whether or not appellant's Sixth Amendment right to compulsory process is violated by imposition of a discovery sanction. *Taylor v. Illinois,* 108 S. Ct. 646 (1988). Since the probability of piecemeal review with respect to federal issues is evident in this case, this Court should permit the state court proceedings to go forward so that a sufficient record on all issues may be developed.

The resolution of appellant's issues can await final judgment without any adverse effect upon important federal interests. *Flynt v. Ohio, supra,* 451 U.S. at 622. This Court should dismiss the appeal for want of jurisdiction.

II. THE CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

Appellant Carkulis contends that his compliance with the state court's discovery order would violate his rights under the Fifth Amendment by requiring him to disclose information which would assist the prosecutor in presenting a *prima facie* case. This contention ignores the procedural safeguards in Montana's discovery statutes and depends upon an exceedingly narrow reading of this Court's previous decisions.

Under Montana's discovery statutes a criminal defendant is *not* required to disclose any information to the prosecutor unless the defendant himself intends to disclose it at trial. If any of the information which the defendant is

obliged to disclose under the law would provide the State with a "link in the chain" of evidence in its case-in-chief, the defendant may move the trial court to deny, defer, excise, or otherwise regulate the disclosure of such information under Mont. Code Ann. § 46-15-328. If good cause is shown, the name of an individual may be added to a defendant's witness list *after* trial has begun, pursuant to Mont. Code Ann. § 46-15-323(3). The discovery statutes also prohibit any additional disclosure requests which would violate the defendant's constitutional rights, which would be unreasonable or oppressive, or which involve the work product of the defendant or his attorney. Mont. Code Ann. §§ 46-15-323(6), 46-15-324.

By including these protections in the discovery statutes the Montana Legislature has recognized and addressed appellant's concern that his disclosure of rebuttal evidence would lead to additional prosecution evidence for the State's *prima facie* case. Appellant has not made use of the protective procedures afforded by the statutes. Viewed in light of all of Montana's discovery provisions this constitutional challenge is without merit.

In *Williams v. Florida*, 399 U.S. 78 (1970), this Court concluded that a criminal defendant has no constitutional right to await the end of the state's case before announcing the nature of his defense. The privilege against self-incrimination is not infringed by prosecutorial discovery of the identities of prospective witnesses and trial exhibits where the prosecution is under a reciprical duty to disclose and the disclosures are limited to those witnesses and documents which will actually be used at trial.

Montana's discovery statutes are based upon the accelerated disclosure rationale in *Williams* and upon the

reciprocity required by the Court in *Wardius v. Oregon,* 412 U.S. 470 (1973). In *Taylor v. Illinois,* 108 S. Ct. 646 (1988), this Court noted that there may be cases in which a defendant has legitimate objections to disclosing the identity of a potential witness. Such objections should be raised in advance of trial in response to the discovery request and, if necessary, presented to the court as a request for a protective order. 108 S. Ct. at 656 n.20. Montana's statutes provide for protective orders in such a case, and the Montana Supreme Court has construed the statutes to permit *ex parte* applications for protective orders so that no information not properly discoverable will come to the attention of the prosecutor.

Appellant's Fourth Amendment contention is also without merit. Appellant argues that Montana's discovery statutes concerning pretrial disclosure of prospective trial exhibits violate his right to be free from general warrants. However, the Fourth Amendment has not been viewed by this Court or other courts as limiting the pretrial disclosure of evidence which a defendant intends to use at trial. This case does not involve a warrant or a search and seizure. Compliance with the discovery rule requires only that a defendant accelerate the disclosure of prospective exhibits which will be disclosed at trial and are therefore relevant to the issues in the case. The scope of discovery is defined with particularity in the statutes and is limited to those exhibits which must eventually come to light at trial.

The questions raised in this appeal are so unsubstantial as not to need further argument. The Montana criminal discovery statutes at issue protect the constitutional rights of a defendant while providing both parties the maximum

possible amount of information with which to prepare their cases, reducing the possibility of surprise and disruption at trial. Such discovery procedures are consistent with this Court's previous decisions and enhance the fairness of the adversary system. *Wardius v. Oregon, supra.* No substantial federal question is presented here.

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CONCLUSION

Because the decision of the Montana Supreme Court was not a final judgment and the case does not present a substantial federal question, appellee respectfully moves the Court to dismiss the appeal or, alternatively, to affirm the Montana Supreme Court's decision.

Respectfully submitted,

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